

# STATE OF COLORADO

DEPARTMENT OF REVENUE  
State Capitol Annex  
1375 Sherman Street, Room 409  
Denver, Colorado 80261  
Phone (303) 866-3091  
FAX (303) 866-2400



John W. Hickenlooper  
Governor

Barbara J. Brohl  
Executive Director

GIL-12-003

February 29, 2012

XXXXXXXXXXXXXXXXXX  
ATTN: XXXXXXXXXXXX  
XXXXXXXXXXXXXXXXXX  
XXXXXXXXXXXXXXXXXX

Re: Lay-a-way Service and Cancellation Fees

Dear XXXXXXXXXXXX,

You submitted on behalf of XXXXXX ("Company") a request for guidance on the application of sales tax to lay-a-way service and cancellation fees.

The Department issues general information letters and private letter rulings. A general information letter provides a general overview of the relevant tax issues and is not binding on the Department. A private letter ruling provides a specific determination for a specific set of facts, is binding on the Department but not on the taxpayer, and requires payment of a fee. For more information about general information letters and private letter rulings, please see Department regulation 24-35-103.5 at [www.colorado.gov/revenue/tax](http://www.colorado.gov/revenue/tax) > Tax Library > Rulings. The Department initially treats the company's request as one for a general information letter. If you would like the Department to issue a private letter ruling on the issues you raise, you can resubmit a request and fee in compliance with regulation 24-35-103.5.

## Issue

Are lay-a-way service and cancellation fees subject to Colorado sales tax?

## Background

Company offers a lay-a-way payment plan in which Company agrees to sell goods to a customer if and when the customer completes a series of payments that amount to the total sales price of the product. Company collects a lay-a-way service fee when the lay-a-way service is initiated. Company also collects a 10% down payment. If the customer cancels

the lay-a-way payment plan, Company refunds the down payment and any subsequent installment payments made. However, Company retains the lay-a-way service fee and also charges the customer a lay-a-way cancellation fee.

## Discussion

### *Lay-a-way Service Fee*

Colorado imposes sales tax on the sale of tangible personal property. §39-26-104, C.R.S. A “sale” occurs when the retailer transfers title or possession of taxable goods to the buyer. See, Department regulation 39-26-102.10 (“a transaction shall be considered a sale if the ownership or possession of tangible personal property or specified services transfers from a seller to a buyer.”). In the circumstances you outline, it is fairly clear that title does not pass to the customer unless and until the final lay-a-way payment is made. However, it is less clear whether the service fee represents, at the time the fee is charged, a transfer of at least some possessory interest in goods. In most lay-a-way plans, the retailer does not identify and set aside a specific item but, rather, agrees only to provide the type of item if and when the final lay-a-way payment is made. In such cases, it is unlikely that the customer has acquired sufficient possession and control over an item to trigger a sale or use tax liability.

If, however, the retailer sets aside a specific item, then, in some sense, customer has purchased a degree of control over the property. The department has not addressed in regulation or publication whether this degree of control is sufficient to trigger a sales tax liability. We note, however, that such a fee is similar to an option contract to purchase an item in the future. Option contracts are often viewed as intangible property rights. Colorado does not levy sales or use tax on the purchase of intangible property. Most states we reviewed treat option contracts as the purchase of an intangible contract right. For example, California Sales and Use Tax Annotation No. 168.0010, (option to buy coins at a set price at a future date is an intangible contract right and is not subject to sales or use taxation); Iowa Memorandum December 24, 1974, 12/24/1974, (trading in commodity futures is regarded as dealings in intangible property and are not be subject to sales or use taxes except in those instances where the option or contract is ultimately closed out by delivery of the commodity); New York, *Matter of BAP Appliance Corp.*, Tax Appeals Tribunal, June 29, 1989; *Matter of William Hengerer Co.*, State Tax Commn., May 27, 1982 [TSB-H-82(93)S], (a current payment under a contract creates an intangible contract right, or option, to purchase tangible personal property in the future, and no taxable sale has taken place); Wisconsin Sales and Use Tax Report No. 1-75, 03/01/1975, (trading in contracts for the future delivery of futures is treated as a sale of intangible property and is not subject to a sales or use tax, except in those instances where the option or contract is ultimately closed out by delivery of good).

Viewing an option contract as intangible property is also consistent with our view that the creation of a lay-a-way plan is not a taxable sale because there is no “present” sale of goods but, rather, only an enforceable agreement to sell goods at a future date. See,

department GIL 11-001; Colorado Uniform Commercial Code, §4-2-105(2), supra, at footnote 1.

One might also view this fee as a charge for a service to the extent that the charge is intended to reflect the retailer's labor and financial (lost opportunity to sell the item at an earlier date) costs related to setting aside a specific item from inventory. Except as discussed immediately below, Colorado does not levy sales tax on the sale of services nor on the finance charges that are separately stated. See, generally, FYI Sales 52 (Service Enterprises) and regulation 39-26-102.7(a)(4) (separately stated finance charges excluded from sales price).

We are inclined to view the service fee as lacking a sufficient possessory interest in the goods to trigger sales or use tax liability, regardless of whether the retailer specifically identifies the goods or not.<sup>1</sup> A customer does not acquire by such fee any beneficial use of the goods. Rather, customer has only an enforceable right to require the retailer to sell goods at a future date. This is similar to an option contract, which is best characterized as the purchase of an intangible contract right, and which is not subject to sales tax, except as noted immediately below.

Although the service fee is likely not, in and of itself, a taxable charge, such charges are taxable in some circumstances. We start by noting that sales tax is calculated using the "purchase price paid or charged." §39-26-104(1)(a), C.R.S. "Purchase price:" means "the amount of money received or due in cash and credits [and] ... [a]ny consideration valued in money..." Department regulation 39-26-102.7(a)(1) and (3). Fees, which are otherwise non-taxable (e.g., charges for services) but are also related to the sale of taxable goods are included in the sales tax calculation if the fees are inseparable from the sale of the product. *AD Stores v Department of Revenue*, 19 P.3d 680 (Colo. 2001). Although we do not decide the issue here, the lay-a-way service fee appears inseparable from the sale of goods because customers cannot purchase items using the lay-a-way plan without also paying the lay-a-way service fee. If it is inseparable, then the lay-a-way service fee must be included in the calculation of sales tax if and when the sale is consummated. However, if the lay-a-way is canceled before title or possession is transferred to the customer, then the lay-a-way service fee is not subject to sales tax because there is no taxable sale.

The majority of other states we reviewed follow a similar approach. See, for example, California SBE Tax Information Bulletin No. September 2001, 09/01/200, ("When you complete the sale and transfer the item to the customer, you should report the total amount received from the sale including any lay-a-way fee charged. If the sale is cancelled and the lay-a-way fee forfeited, the fee is not taxable since no sale occurred"); Kansas Private Letter Ruling No. P-2011-008, 09/22/2011, (A non-refundable lay-a-way fee or a lay-a-way

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<sup>1</sup> Although we are inclined to treat the service fee as either an option contract or service fee, we do not decide this issue in the context of general information letters, such as this. If the service fee does create a sufficient right of possession in the customer, then sales tax would be due at the time the service fee is paid by the customer, regardless of whether the customer completed the lay-a-way plan. Additional sales tax would also be due when the final payment is made.

cancellation fee is not subject to sales tax because a retail sale has not been made); Maine Instructional Bulletin No. 39, 01/17/2012, (A lay-a-way service fee is a charge for a service that is part of the sale and is therefore included in the taxable sale price when a sale is completed, but is not taxable when it is retained by the retailer after a lay-a-way sale arrangement is cancelled. A fee charged for the cancellation of a lay-a-way sale arrangement is not taxable); Missouri Private Letter Ruling No. LR 6969, 11/04/2011, (The lay-a-way service fee is part of the amount of the sales price subject to sales tax. If the lay-a-way is cancelled, the lay-a-way service fee is not subject to sales tax because there is no sale of tangible personal property or taxable service. Because there is no sale of tangible personal property and lay-a-way cancellation is not a taxable service, the cancellation fee is not subject to sales tax).

#### *Lay-a-way Cancellation Fee*

The lay-a-way cancellation fee is charged to customers for canceling the lay-a-way service. If a customer cancels the lay-a-way service, the cancellation fee is not, for the reasons discussed above relating to the service fee, subject to sales tax. See, also, Illinois Dept. of Rev. General Information Letter ST 12-0007-GIL, 01/31/2012, (A cancellation fee is not taxable because the fee is imposed only if the sale of tangible personal property is not completed).

### **Miscellaneous**

This letter represents the good faith opinion of Department personnel who are knowledgeable on state taxes issues. However, the Department does not make a specific determination here on any of the issues raised and the Department is not bound by this general information letter.

The department administers state and state-administered local sales and use taxes. This letter does not address sales and use taxes administered by home-rule cities and home-rule counties. You may wish to consult with local governments which administer their own sales or use taxes about the applicability of those taxes. Visit our web site at [www.colorado.gov/revenue/tax](http://www.colorado.gov/revenue/tax) for more information about state and local sales taxes.

Enclosed is a redacted version of this letter. Pursuant to statute and regulation, this redacted letter will be made public within 60 days of the date of this letter. Please let me know in writing within that 60 day period whether you have any suggestions or concerns about this redacted letter.

Sincerely,

Neil L. Tillquist  
Colorado Department of Revenue  
Tele: (303)866-5627  
Email: [ntillquist@spike.dor.state.co.us](mailto:ntillquist@spike.dor.state.co.us)